(1)

IN THE HIGH COURT OF DELHI

+ O.M.P. No. 5 of 2005

Date of Decision: May 10, 2006

The National Small Industries Corporation Ltd. .....Plaintiff
!

through : Mr. T.K. Ganju with
Mr. A.K. Thakur and R.K. Mishra,
Advocates

Versus

$ Dual Structurals & Industries Ltd. .....Defendant
^

through : Mr. Jayant Nath with
Mr. Rajnish K. Jha, Advocates

CORAM :-
***THE HON'BLE MR.JUSTICE A.K.SIKRI**

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J. (Oral)
:

1. The Respondent herein was awarded contract for construction of Software Technology Park (civil) work, Phase-I at Industrial Estate, Ekkadu Thangal, Chennai by the Petitioner and contract dated 9.10.1998 was entered into between the parties for this purpose. As per the said contract, the net amount of the work awarded was Rs.4,02,35,236/-. Further, the contract was to be completed within

Signature Not Verified
Digitally Signed By:AMULYA
Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

sixteen months and the stipulated date of completion of the contract was 20.2.2000. After about 12 months of the commencement of the work, the Petitioner awarded additional work in October-November 1999, in two phases, for an approximate value of Rs.1.0 crore. As per the Petitioner the work was actually completed on 21.6.2001 and according to him there was a total delay of 484 days. The Respondent had sought extensions from time to time to complete the work from time to time, which were granted by the Petitioner subject to imposition of liquidated damages, as provided in clause 30 of the terms and conditions of the said contract. According to the Petitioner, the Respondent could justify delay of 345 days only and since delay of 139 days was attributed to the Respondent herein, it imposed liquidated damages as per clause 30. Disputes does arose as Respondent treated the recovery of liquidated damages as unjustified. Since the contract between the parties contained arbitration clause, Respondent invoked the arbitration pursuant whereto Petitioner appointed Mr. P.Krishnan as the Sole Arbitrator. Apart from the aforesaid claim in respect of liquidated damages, Respondent had preferred certain other claims as well. Petitioner also preferred its counter claims. After adjudicating these claims, the arbitral tribunal

gave its award dated 25.9.2004.

2. Petitioner has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the said award. Challenge is limited to the award on Claim No.1 which was a claim preferred by the Respondent herein against recovery of liquidated damages.

3. Perusal of the award on Claim No.1 would show that the learned Arbitrator held that recovery of liquidated damages was not proper. He noted clause 30 of the terms and conditions of the contract which is captioned *"time is essence of the contract"*. However, as additional works were given to the Respondent almost about 12 months after the date of commencement, award of this additional work weighed with the learned Arbitrator in coming to the conclusion that *"time did not remain essence of the contract"*. This would be clear from the following observations of the learned Arbitrator :

> "It is to be noted that the agreement between the parties was for Phase I of the work. However, additional work of 'Construction of one canteen and two additional rooms in the existing hostel building' was included in the scope of work on 21.10.1998 itself. The major work of Phase II of the project, a double storeyed structure covering more then 19000 sft. was included in the contract in Oct/Nov.1999, that

is, about 12 months after the date of commencement. Other additional works such as parking were also got done. The value of the additional works was over Rs.1 crore, while the cost of original work as per actual quantities executed was of the order of Rs.3 crores. When the additional works which were not part of the original contract was included, first the canteen and additional rooms in the hostel in the initial stages and the Phase II work in the later stages, no specific time frame was fixed by the Respondents or mutually agreed by the parties for these works, and made essence of the contract. Time of sixteen months stipulated in the agreement as essence of the contract is no longer valid when major additional works have been got executed under the same contract. The stipulated period of contract was over on 20.02.2000. A letter has been issued by the Respondents only on 09.06.2000 granting provisional extension upto 31.08.2000 subject to levy of liquidated damages as per provisions of the contract agreement. Thus after 20.02.2000, as no new period of completion has been fixed, it has to the deemed that time has been set at large and no longer the essence of the contract. Similarly the second letter of provisional extension was issued on 17.11.2000 (much after 31.08.2000) extending completion period upto 31.12.2000 without prejudice to the right to levy liquidated damages. After 31.12.2000 also the work continued without any specific period being fixed. Thus it has to be concluded that time having been set at large, was no longer the essence of the contract. The contention of the Respondent that levy of compensation is automatic when the contractor fails to complete the work cannot be accepted as the scope of the work has been substantially enlarged at various stages without fixing specific additional time for such works and making them essence of the contract."

The learned Arbitrator also recorded that after the additional works were allotted to the Respondent, no specific

additional time frame was fixed for these new works.

4. Learned Counsel for the Petitioner submitted that the aforesaid findings and conclusion of the learned Arbitrator are in ignorance of specific clauses in the contract. He referred to clauses 9 & 11 of the contract, which read as under :

> **"9. <u>Deviations/Variations Extent & Pricing</u>**
>
> 9.1 The Engineer-in-Charge shall have power (i) to make alterations in, omissions from, additions to, or substitutions for the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and (ii) to omit a part of the works in case of non-availability of a portion of the Site or for any other reasons, and the Contractor shall be bound to carry out the Works in accordance with any instructions given to him in writing signed by the Engineer-in-Charge and such alterations, omissions, additions or substitution shall form part of the Contract as if originally provided therein and any altered, additional or substituted work which the Contractor may be directed to do in the manner above specified as part of the Works, shall be carried out by the contractor on the same conditions in all respects including pace on which he agreed to do the main work. Any alternations, Omissions, additions or substitutions which radically change the original nature of the contract shall be ordered by the Engineer-in-Charge as a deviation and in the event of any deviation being ordered which in the opinion of the contractor changes the original nature of the Contract, he shall

nevertheless carry it out and the disagreement, if any, as to the nature of work and the rate to be paid therefore shall be resolved in accordance with Condition 50.

9.2 The time for completion of the Works shall, in the event of any deviations resulting in additional cost over the Contract Sum being ordered, be extended as follows if requested by the Contractor:
(a) In the proportion which the additional cost of the altered additional or substituted work bears to the original Contract sum; plus

(b) 25% of the time calculated in (a) above or such further additional time as may be considered reasonable by the Engineer-in-Charge.

Rates for such additional, altered or substituted work shall be determined by the Engineer-in-Charge as follows :

(i) If the rate for additional, altered or substituted item of work is specified in the Schedule of Quantities, the Contractor shall carry out the additional, altered or substituted item at the same rate.

(ii) If the rate for any altered, additional or substituted item of work is not specified in the schedule of Quantities, the rate for that item shall be derived from the rate for the nearest similar item specified therein.

(iii) If the rate for any additional, altered or substituted item of work cannot be determined in the manner specified in sub-paras (i) and (ii) above, then such item of Work shall be carried out at the rate entered in the Schedule of Rates mentioned in Appendix plus/minus the percentage by which the tendered amount of the works actually awarded is higher or lower than the estimated amount of the

Works actually awarded.

(iv) If the rate for any altered, additional or substituted item of work cannot be determined in the manner specified in sub-paras (i) to (iii) above, the contractor shall, within 14 days of the date of receipt of the order to carry out the said work, inform the Engineer-in-Charge under advice to the Accepting Authority of the rate which he proposes to claim for such item of work, supported by analysis of the rate claimed, and the Engineer-in-Charge shall, within three months thereafter, after *(sic)* give due consideration to the rate claimed by the Contractor, determine the rate on the basis of market rate(s). In the event of the Contractor failing to inform the Engineer-in-Charge within the stipulated period of time, the rate which he proposes to claim, the rate for such item shall be determined by the Engineer-in-charge on the basis of market rate(s).

Time and Extension for Delay

11. The time allowed for execution of the works as specified in the Appendix or the extended time in accordance with these Conditions shall be the essence of the Contract. The execution of the works shall commence from the 15th day after the date on which the Corporation issues written orders to commence the work. If the contractor commits default in commencing the execution of the work as aforesaid, Corporation shall without prejudice to any other right or remedy be at liberty to forfeit the earnest money absolutely.

11.1 As soon as possible after the Contract is concluded the Engineer-in-Charge and the Contractor shall agree upon a Time and Progress Chart. The Chart shall be prepared in direct relation to the time stated in the Contract documents for completion of items of the works. It shall indicate the forecast of the dates of

commencement and completion of various trades or sections of the work and may be amended as necessary by agreement between the Engineer-in-Charge and the Contractor within the limitations of time imposed in the Contract Documents.

11.2 If the works be delayed by

(a) force majeure or

(b) abnormally bad weather, or

(c) Serious loss or damage by fire, or

(d) civil commotion, local combination of workmen strike or lockout, affecting any of the trades employed on the work, or

(e) delay on the part of other contractors or tradesmen engaged by Corporation in executing work not forming part of the contract, or

(f) any other cause which, in the absolute discretion of the authority mentioned in Appendix is beyond the Contractor's control;

Then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer-in-Charge but shall nevertheless use constantly his best endeavours to prevent or make good the delay and shall do that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the Works satisfaction of the Engineer-in-Charge. If the Contractor shall fail to comply with any of the requirements of this conditions as aforesaid, on or before the date of completion of the Works, the Engineer-in-Charge may at the expense of the Contractor fulfill such requirements and dispose of the scaffoldings, surplus materials and rubbish, etc. as he thinks fit and the Contractor shall have no claim in

respect of any such scaffolding or surplus materials except for any sum actually realised by the sale thereof less the cost of fulfilling the requirements and any other amount that may be due from the Contractor. If the expense of fulfilling such requirements is more than the amount realised on such disposal as aforesaid, the contractor shall forthwith on demand pay such excess."

5. At this stage, in order to appreciate the contention of learned Counsel for the Petitioner, it would be apposite to reproduce clause 30 of the contract as well, which is reproduced below :

"30. **Liquidated Damages for Delay**

30.1 Time is essence of the contract. In case the CONTRACTOR fails to complete the whole work within the stipulated period and clear the site he shall be liable to pay liquidated damages @ 1.0% (one Percent only) of the value of contract per week and or part thereof of the delay subject to a maximum of 10% (ten percent only) of the value of the contract. The parties agree that this is a genuine pre-estimate loss/damage which will be suffered on account of delay on the part of the Contractor and the said amount will be payable on demand without there being any proof of the actual loss of damages caused by such delay.

30.2 The amount of Compensation may be adjusted or set-off against any sum payable to the contractor under this or any other contract with the Corporation."

6. A conjoint reading of these clauses would show: (a) time was made essence of the contract; (b) in case of contractor's (Respondent

herein) failure to complete the work within the stipulated period, provision for liquidated damages is also made in the contract; (c) as per clause 9 the Petitioner was within its right to award additional work to the contractor and such works had to be executed by the contractor in the manner specified in the contract treating them as part of the works as originally awarded, namely, the same were to be carried out by the contractor on the same conditions in all respects, including pace on which he agreed to do the main work; (d) on award of additional works, time for completion of the work was to be extended in the proportion which the additional cost of the altered additional or substituted work bears to the original contract sum, plus, 25% of the time calculated in the aforesaid manner; and (e) when the time is extended in the manner provided in clause 9.2, the extended time becomes the essence of the contract as specifically stated in clause 11.

7. Thus, even when there was additional work awarded to the Respondent herein, contract specifically provided for extension of time and extended time became the essence of the contract. In the impugned award, learned Arbitrator has not even considered the implications of clause 9 & 11 of the terms and conditions of the

contract. By ignoring these provisions, he concluded that since additional work was awarded and while awarding the same no specific time frame was stipulated, time did not remain the essence of the contract. This finding of the learned Arbitrator is contrary to the provisions of clause 9 & 11 of the terms and conditions of the contract.

8. The Hon'ble Supreme Court in ***Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.***, AIR 2003 SC 2629, has clearly held that when an award is given by the arbitral tribunal which is contrary to the specific provisions of the contract or in ignorance of the said provisions, it would be opposed to public policy. Relevant observations in the judgment are extracted below:

> "15. The next clause which requires interpretation is Clause (ii) of Sub-section 2(b) of Section 34 which inter alia provides that the Court may set aside arbitral award if it is in conflict with the 'Public Policy of India'. The phrase 'Public Policy of India' is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending

upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions.

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From the judgments discussed above, it can be held that the term 'public policy of India' is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or nullity. But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal could be set aside. If narrow meaning as contended by the learned senior counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the Arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "arbitral tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific

usage of the trade that if the payment this made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that arbitrator shall decide *ex aequo et bono* [according to what is just and good] only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'."

9. To the same effect is the judgment of the Supreme Court in ***Bharat Coking Coal Ltd. v. M/s. Annapurna*** Construction, AIR 2003 SC 3660 wherein the Supreme Court restated the law in the following manner:

"22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contracts. If he has travelled beyond the contract, he would be acting without

jurisdiction, whereas if he has remained inside the parameter of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the records.

23. In paragraph 577 of Halsbury's laws of England 4th Edition Vol 2, the law has been stated in the following terms:

> "As an arbitrator (and subsequently any umpire) obtains his jurisdiction solely from the agreement for his appointment it is never open to him to reject any part of that agreement, or to disregard any limitations placed on his authority, as, for example, a limitation on his right to appoint an umpire. Nor can he confer jurisdiction upon himself by deciding in his own favour some preliminary point upon which his jurisdiction depends. Nevertheless he is entitled to consider the question whether or not he has jurisdiction to act in order to satisfy himself that it is worth while to proceed, and an award which expressly or impliedly refers to such a finding is not thereby invalidated.

24. In 'Commercial Arbitration' by Mustill and Boyd at page 598 it is stated:

> "in the first place, it could be argued that an arbitrator who is appointed in respect of a dispute arising under a contract expressly or impliedly governed by English law is authorised by the parties to pronounce upon the issues in accordance with that law, and in no other way. Any decision which

proceeds, on a different basis lies outside the scope of the arbitrator's mandate to bind the parties. The award is accordingly void for want of jurisdiction, since the arbitrator has done something which the parties never authorised him to do. Secondly, it would be possible to draw support from a line of authority culminating in three important decisions during the past decade which approach the question whether a tribunal can effectively decide contrary to law by using the word 'jurisdiction' in the first of the three senses indicated above. Whilst a reconciliation of this decision is a matter for a treatise on administrative law, there is no doubt that in relation to certain kinds of tribunal the law has recognised a distinction between errors of law which go to jurisdiction and those which do not, and that there is a difference between tribunal which has arrived at a decision by asking itself the wrong question, and one which has correctly identified the question, but has supplied the wrong answer in terms of law. Following up this line of authority, it could be said that an arbitrator empowered to decide the rights of the parties under a contract governed by English law, who asks himself not what England law has to say about those right, but what the rights ought to be if assessed in accordance with his own ideas of an extra-legal concept of justice, is either asking himself the wrong question, or not really asking a question at all."

25. In Alopi Parshad & Sons Ltd. v. Union of India MANU/SC/0057/1960, this Court clearly held that

if damages are awarded ignoring the expressed terms of the contract, the arbitrator would commit misconduct of the proceedings. Reference in this connection may also be made to Naihati Jute Mills Ltd. v. Khyaliram Jagannath MANU/SC/0348/ 1967.

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40. However, as noticed hereinbefore, this case stands on a different footing, namely, that the arbitrator while passing the award in relation to some in terms failed and/or neglected to take into consideration the relevant clauses of the contract, nor did he take into consideration the relevant materials for the purpose of arriving at a correct fact. Such an order would amount to misdirection in law."

10. Learned Counsel for the Respondent could not dispute this position. He, however, submitted that this would be of no consequence inasmuch as the Arbitrator has also held that the Petitioner herein was responsible for delays. Not only there had been initial delay in handing over the full site, there was also delay in decisions and issuing of drawings as well. These observations were made by the learned Arbitrator in the following manner :

"During the course of the work, the Respondents have issued a number of letters pointing out that the labour and materials at site are inadequate to complete the work in the time period. The Claimants have also issued a number of letters pointing out delays in issue of drawings decisions etc. There has been initial delay in handing over the full site, delay in decisions and issue of

drawings, the last drawing having been issued on 13.11.2000"

11. Learned Counsel for the Respondent also submitted, referring to the judgment of the Supreme Court in ***M/s. Sudarsan Trading Co. v. The Govt. of Kerala & Anr.***, AIR 1989 SC 890, that Arbitrator was the best Judge to decide the questions of fact of law and interpretation of the contract was a matter which was within the domain of the Arbitrator. While there is no clarity about this proposition, what is pointed above is that the learned Arbitrator has ignored the provisions of the contract. Had he noted provisions of clauses 9 & 11 and given his interpretation, matter would have been different. However, while recording his conclusions, he did not care to read clauses 9 & 11 of the terms and conditions of the contract, which clearly provide provision for suitable extension coupled with the provision making such extension an essence of the contract.

12. No doubt the learned Arbitrator has imputed some delay on the part of the Petitioner. However, reading of the reasoning of the Arbitrator on this claim along with portion extracted above, as well as the observations subsequent to the aforesaid extracted para, it

is clear that the learned Arbitrator was mainly influenced by the fact that time was no longer an essence of the contract as after the award of substantial additional works, no specific additional time has been fixed for these works. There is no finding given by the learned Arbitrator independent of the aforesaid finding to the effect that the damages could not be levied because of the reason that Petitioner herein was responsible for delays. Since Arbitrator has been mainly influenced by the consideration that time did not remain the essence of the contract and this finding is contrary to the provisions of contract, as mentioned above, award on Claim No.1 is liable to be set aside. Consequently, award of interest on this claim awarded under Claim No.7 is also liable to be set aside.

13. Learned Counsel for the Respondent further submitted that in the case of Saw pipes (supra) itself the Supreme Court has commented about the provision regarding pre-estimated damages and if it is penal in nature, the Department cannot levy such damages. This can be the submission which Respondent herein can make before the learned Arbitrator and it would be for the learned Arbitrator to decide the issue afresh, after considering the submissions of both the parties and with reference to the legal

position clarified above. Since award on Claim No.1 & 7 is severable, rest of the award is maintained.

14. Registry is directed to send back the original record to the Arbitrator.

15. Dasti to both the parties.

(A.K. SIKRI)
JUDGE

May 10, 2006
nsk

– Listed in view of receipt of reconsidered award dt. 30/8/08.
P.I